SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1096

PIERCE OIL CORPORATION, AND HENRY C. RIELY AND ROBERT T. BARTON, JR., AS ITS RECEIVERS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Upon this application for a Writ to the Court of Claims, we have incorporated in the Petition the basis of jurisdiction, together with the facts disclosed by the Record.

This Brief will therefore be limited to the application of those facts and of the few pertinent authorities, to the specifications of error urged, and the consequent reasons for granting this Writ.

As stated in the Petition, the case involves Section 821 of the Revenue Act of 1938, enacted some two years after the petitioner had paid $2,035,721.77 of income taxes and accrued interest thereon for the taxable years 1918, 1919 and 1920, under an agreement of settlement.

That very agreement, as implemented by legal and administrative mandate, impelled payment of a substantial portion of the amount of the agreed settlement as the interest on delinquent taxes referred to in the Statute, at the rate of 12% that accrued after October 24, 1933 and prior to August 30, 1935.

The Statute reads as follows:

> "Sec. 821. Interest Accruing after October 24, 1933, and before August 30, 1935, on Delinquent Income, Estate, and Gift Taxes.
>
> Interest accruing after October 24, 1933, and prior to August 30, 1935, on delinquent income, estate, and gift taxes shall be computed at the rate of 6 per centum per annum. Any such interest accruing during such period which has been collected prior to the date of the enactment of this Act in excess of such rate shall be credited or refunded to the taxpayer, if claim therefor is filed within six months after the date of the enactment of this Act. No interest shall be allowed or paid on any such credit or refund."

The relief intended is retroactive. Manifestly no part thereof was or could have been contemplated by either party when the payment was made by petitioner to the Government on April 30, 1936.

The Genesis of the Statute

Section 821 was enacted as the result of an Opinion by the Attorney General rendered on October 24, 1933 (38 Op. A. G. 94), holding that 12% delinquency interest could not be separately compromised apart from the assessed deficiency to which it attached. This is manifest from the Senate debate the explanation of which appears in the Congressional Record and is quoted in full in the Opinion in the Court of Claims (R. 36).

We invite particular attention to the statement by Senator King (Opinion, R. 38):

> "For many years the Treasury in such cases compromised interest liability for 6 percent, and in 1935 the exclusive 12-percent rate was reduced to 6 percent on the recommendation of the Treasury. In the case of a comparatively few, however, the Treasury was prevented from compromising and was compelled to collect the 12 percent because of an opinion of the Attorney General rendered in October 1933."

The Petition sets forth the pertinent portions of that Opinion (ante, p. 8).

As the result of the jeopardy assessment levied by the Government against this taxpayer on January 13, 1933, penal "delinquency" or "delinquent" interest (as it is variously referred to in the Opinion) at 12% annually accrued and became payable on the aggregate of deficiencies and deficiency interest from January 13, 1933 until August 30, 1935, after which date the rate of delinquency interest was reduced to 6% by the Revenue Act of 1935.

But as the result of the Attorney General's ruling, the Government was compelled to include 12% delinquency interest upon the deficiencies and deficiency interest in every instance, even where the deficiency was settled by agreement with the taxpayer.

That is precisely what occurred here. The Opinion as well as the record discloses the precise amount to a penny of the $2,035,721.77 paid by the taxpayer on April 30, 1936 that consisted of delinquency interest at 12% and 6%. We invite attention, for example, to (1) the computations made by the Treasury (Finding 12, R. 27); (2) the records on the books of the Collector of Internal Revenue (second tabulation in Finding 16, R. 31), and (3) the results of the assessments and overassessments so appearing (Finding 20, R. 35).

The final agreement of settlement between the parties which is *Defendant's* Exhibit 7-A (a copy of which we be leave to annex to this Brief as Appendix A), sets out i Paragraph 2 thereof the precise amounts of interest re flected in the findings above referred to, the breakdown o which into tax deficiency, deficiency interest and delinquenc interest is specified in Findings 12, 16 (second tabulation and 20, R. 27, 31, 36).

The Government has so far successfully sustained it thesis respecting the alleged effect of the original offer o the taxpayer dated March 31, 1936 that is incorporated i full in Finding 10 (R. 24-26).

ARGUMENT

I

The Vital Error of the Court Below in Treating That Unaccepted Offer of March 31, 1936, as if It Were the Final Contract, Consists in the Fact That There Were Material Variations between the Offer and the Actual Agreement of Settlement (Appendix A to This Brief).

The text of Appendix A shows on its face that at the time, on April 28, 1936, when the instrument was executed, one month after the offer of March 31, 1936:

(a) The Commissioner still had the previous offer "under consideration."

(b) That offer had been "orally modified."

(c) One modification of the prior offer was the require ment that plaintiff relinquish its right to refunds for prior years amounting, with interest, to about $37,000.

(d) Execution of that agreement (of April 28, 1936) by the Commissioner was to constitute acceptance of the offer as modified.

(c) Unless and until the contract of April 28, 1936 was executed by or on behalf of all parties there was to be no agreement between them.

That contract is only incidentally referred to in the findings or the opinion. In the face of its terms how can a finding of any previous "acceptance" be justified? Any such finding is directly contrary to the express recitals and provisions of the contract, which reduced to writing in final form all previous offers, negotiations, and modifications. It is the only instrument setting forth the agreement between the parties after all the "trading" was done.

II

Relief under a Retroactive Tax Statute Should Not Be Precluded because of a Prior Settlement Involving Controverted Issues Having No Relation to the Subject of the Relief Afforded by the Statute.

Had Section 821 of the 1938 Revenue Act not been passed, no question could possibly have arisen. That Act however afforded relief in respect of one feature of the settlement that could not possibly have been contemplated by either party at the time the transaction was concluded.

The relief so afforded was explicitly made retroactive.

The Court below has denied recovery on the ground that the Statute was not intended to apply where the parties had settled a tax deficiency by agreement, and notwithstanding that the Statute is absolute and does not contain any qualifications where a settlement has been had.

This is the principal factor that has raised the issue we have asked this Court to consider, in connection with which we invite attention to Specifications of Error Nos. 4 and 5, together with the exposition following Reason No. III of the Petition why we believe the Writ should be granted.

There are today and are developing in increasing number instances where retroactive relief is afforded to a taxpayer. Large sums of money and substantial rights are involved in the construction of those statutes. A type of case that is bound to arise in increasing frequency will result from agreed settlements of tax claims resulting from certain features of interpretation that may be doubtful, but where other features of the law may be deemed free from doubt.

If thereafter there is a retroactive statute affording relief in respect of the feature that previously—when the settlement was made—appeared free from doubt, and the computation of a possible refund is clear, as in this case, will the fact of settlement preclude recovery?

In this instance, for example, both parties conceded in 1936 that positive law and administrative mandate impelled the collection of 12% delinquency interest between the effective dates of Section 821. That Act thereafter afforded the taxpayer in positive language the right of recovery to the extent that the interest exceeded 6%.

The relief afforded some two years later was not within the contemplation of the parties. The settlement resulted not from any dispute respecting the rate of delinquency interest but because of numerous features unrelated thereto that arose in the course of this lengthy and complicated litigation.

Corresponding problems are bound to arise in respect of the application of other statutes affording retroactive relief. There is an acknowledged trend towards effecting settlements arising on conflicting interpretations of internal revenue statutes and regulations that have developed, particularly as the result of the war.

Statutes affording retroactive relief are being enacted in increasing numbers and will in all probability continue to be enacted. Many of these settlements are made in the light of established law as to one factor that is involved, which

may well be and often is completely changed by subsequent enactments affording relief to the taxpayer.

If the right to recovery resulting from the retroactive provision affording relief is clear, the prior settlement should not militate against such right of recovery.

There Is a Conflict in the Decisions Below under a Closely Kindred Problem

There is, as stated in the Petition, a closely analogous legal situation where a conflict does exist. We refer to those instances where a settlement has been closed upon the assumption of a certain state of the law. Thereafter, the Courts decide that same question of law otherwise by one or more subsequent decisions.

Thus, the Court of Appeals for the Second Circuit held in *Staten Island Hygeia Ice & Cold S. Co.* v. *United States*, 85 F. (2d) 68 (1936), and *Cloister Printing Corporation* v. *United States*, 100 F. (2d) 355 (1938), that the taxpayer could maintain a suit to recover amounts of taxes and interest paid pursuant to compromise settlement agreements, because the Courts had in other cases subsequently decided that the particular tax was uncollectible at the time the payment under the compromise settlement was made. On the other hand, the Court of Claims held in *Hord* v. *United States*, 59 F. (2d) 125 (1932), that a compromise settlement agreement precluded the taxpayer's recovery of interest notwithstanding the fact that subsequent to the compromise settlement the collection of the particular tax was held by another Court decision to have been barred by limitation.

Aside from the foregoing factors, this Court has at no time construed Section 821 of the 1938 Revenue Act. The Government will doubtless argue that few if any cases

necessitating that construction have arisen within the Department, but that is not the issue here.

The scope of this application directly involves the complete ambit of statutes affording tax relief that may be enacted after there has been a settlement that did not contemplate the change in the law subsequently effected.

III

The Impact of Positive Law and Departmental Mandate Impels Recovery Here.

Although the petitioner paid no more as the result of the final agreement than it was prepared to pay in settlement of the deficiencies and interest, the respondent is nevertheless met by the mandate of its own law and departmental practice.

As the result of the Attorney General's Opinion, delinquency interest was computed at the statutory rates and included a substantial accrual of 12% interest between the effective dates specified in the Act, because that Opinion *compelled* such computation and payment.

The Court below, in adopting the Government's contention, laid stress upon the so-called "lump sum" offer previously made by the taxpayer. It should be a complete answer to this contention that affirmative law and administrative practice rendered the acceptance of that offer legally impossible. The Government was of course at liberty, any time before the final contract (Appendix A to this Brief) was signed by the Commissioner of Internal Revenue, to reject the offer of March 31, 1936, and there is no evidence whatever that the offer itself was ever accepted. The final contract executed by the parties on April 28, 1936, embraced a materially different "offer."

It may also be that the official having charge of the negotiations or even the taxpayer may at first have over-

looked the form and substance of administrative compulsion that resulted from the Attorney General's Opinion. The fact remains that the settlement both in form and substance comprised 12% delinquency interest of the type for which the statute affords explicit relief.

There accordingly arises the serious and important problem whether the respondent may compietely disregard and effectively ignore the necessary result of its own laws and regulations—those that may and undoubtedly have resulted in benefit to the Government—by impelling payment of 12% delinquency interest by other taxpayers as the result of the Attorney General's Opinion.

As stated in the Petition, the issue does not involve the problem of estoppel proper. What it does involve is the obligation of the respondent to abide by its own laws, regulations and administrative practice, an issue that has been raised in Specifications of Error Nos. 6 and 7 and is expounded in the Petition as Reason No. IV why we believe this Writ should be granted.

IV

In Summary

This Petition Involves Questions of General Importance and of Substance Relating to Internal Revenue Statutes of the United States.

The foregoing exposition should establish that there are at least two important isues that are directly presented herein with respect to which the Government, as well as any taxpayer, may and should desire clarification in the interests of certainty relating to the construction and administration of the internal revenue laws.

Settlements predicated upon one or more doubtful issues, where other issues at the time are not doubtful, may

well be and doubtless will have to be considered in th light of subsequent laws affording retroactive relief affec ing the issues on which there was no doubt at the time o the settlement.

A reading of the numerous statutes affording retroa tive relief to taxpayers, for example, those referred to i the Petition, discloses that they are absolute in their term as is Section 821, and are not circumscribed by the factu of any previous settlement or compromise of the tax li bility for the years involved, precisely as appears from t text of Section 821.

Administrative practice that impels a result requir by mandates of positive law and regulations should not lightly overlooked in determining the rights either of ta payers or of the Government.

We respectfully urge that these questions clearly wa rant a review of the decision below, wholly aside from t failure of this Court or of any other Court ever to ha construed Section 821 of the Revenue Act of 1938, as w as the manifest error in the decision of the Court of Clai

Conclusion

A writ of certiorari to review the judgment of the Cou of Claims in this case should be granted.

Respectfully submitted,

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